

EXHIBIT A

HIGHLY CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES HAYDEN,)
)
Plaintiff,)
)
vs.) Case No.
) 1:17-cv-02635-CAB
2K GAMES, INC. and)
TAKE-TWO INTERACTIVE)
SOFTWARE, INC.,)
)
Defendants.)

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The video recorded deposition of MICHAL A. MALKIEWICZ, called by the Defendants for examination, pursuant to Notice, and pursuant to the Rules of Civil Procedure for the United States District Courts, taken stenographically by Sandra L. Rocca, CSR, RMR, RDR, CRR, at 300 North LaSalle Street, Chicago, Illinois, on the 19th of August, 2021, at the hour of 9:11 a.m.

Job No.: 2864

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1 A It's an empirical question. There could be.
2 Some of those could be valued at zero, but one would
3 have to do the study. But ultimately, all of the
4 characteristics of the game would, you know, add up
5 to the universe of value that a game brings to the
6 defendants.

7 Q Do you think that if a player's head art was
8 wrong, it would have no value?

9 MR. McMULLEN: Can I hear that back, please?

10 (Record read as requested.)

11 MR. McMULLEN: Objection, vague, calls for
12 speculation.

13 A It's possible. On the other hand, it's an
14 empirical question where my hypothesis would be that
15 it's a sliding scale. That you know, if Take-Two,
16 for example, was not particularly good with that
17 aspect of capturing realism, maybe there would be
18 tweets suggesting so, or Dr. Jay or Dr. Bilgicer
19 would locate such references in production and
20 design their studies to capture such value and/or
21 diminution of such value if that was their task. So
22 there are ways to evaluate that.

23 As I sit here, that wasn't relevant to my
24 calculation or anyone else's, I don't believe, that
25 I've at least encountered in this case. So I don't

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1 piece, while Mr. Malackowski doesn't add back
2 anything. But the first initial step, yes, we're in
3 agreement that we're using the net sales from the
4 May 24th, 2021 document.

5 Q What do the revenues from recurrent consumer
6 spending come from in NBA 2K?

7 MR. McMULLEN: Objection, vague.

8 A They come from different types of spend that
9 consumers engage in. Some is purchases of virtual
10 currency to unlock certain aspects of the game.
11 Some may be for specific features that they can
12 unlock. They're, you know, related to the actual
13 core game that you initially pay for as a price of
14 admission, so to speak, and then you pay a la carte
15 for certain other, you know, experiences within that
16 core game offering.

17 Q You cannot use virtual currency to purchase
18 any of Mr. Hayden's tattoos, right?

19 MR. McMULLEN: Objection, calls for
20 speculation.

21 A I don't believe that one can purchase the
22 real-life tattoos, only -- well, you can pay for
23 removal of tattoos on your My Player and you can
24 also pay for the custom tattoos we've discussed that
25 Take-Two included in the neighborhood store, for

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1 example.

2 Q But you can't purchase real-life tattoos
3 using virtual currency, right?

4 MR. McMULLEN: Objection, vague, calls for
5 speculation. You may answer.

6 A That's my understanding. It's consistent
7 with it.

8 Q So you can't purchase Mr. Hayden's asserted
9 tattoos using virtual currency, right?

10 A Not that I know of. That's not my
11 understanding how the game works.

12 Q And in fact, recurrent consumer spending
13 isn't directed at Mr. Hayden's asserted tattoos at
14 all, right?

15 MR. McMULLEN: Objection, vague.

16 A It's directed in the same way as the initial
17 purchase of the game. There's a part of -- you
18 know, if you look at Dr. Bilgicer's survey, if you
19 look at Dr. Jay's surveys, they talk about -- and
20 they try to measure the value of realistic
21 depictions of tattoos within the game, including in
22 comparison to features such as, you know, My Career
23 mode or, you know, My GM story lines, all these
24 characteristics.

25 So in order for one to apply that percentage

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1 right?

2 MR. McMULLEN: Objection, calls for
3 speculation, incomplete hypothetical.

4 A That could be a starting point.

5 Q Do you know how many tattoos are in NBA 2K?

6 MR. McMULLEN: Objection, vague.

7 A I do not have a number.

8 Q Did you try to calculate it?

9 A I've seen general references that would give
10 me a sense of the order of magnitude, but I've not
11 calculated the number. You know, given that tattoos
12 designs are such unique works of art, it didn't make
13 economic sense to use the sort of pro rata type
14 approach.

15 Q What's the order of magnitude?

16 MR. McMULLEN: Objection, vague, calls for
17 speculation.

18 A Could be between high hundreds and single
19 thousands was I think what I recall just thinking
20 about it.

21 Q Do you remember where you saw that?

22 A It would have been a mental calculation of
23 sorts. There's, you know, something on the order of
24 450 players, some 50 percent of them have tattoos,
25 some have more than one. So that's the order of

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1 magnitude kind of determination.

2 Q This is -- sorry. Were you done?

3 A I've also, you know, with respect to
4 Mr. James and Mr. Green and Mr. Thompson, I've also,
5 you know, generally looked at the order of
6 magnitudes of tattoos that they have to sort of
7 inform me what the averages might be in the league.

8 Q So this is a calculation that you did, not
9 something that you read out in the literature?

10 A Correct. There's no like one article that
11 has this one number that I recall.

12 Q And you didn't put that calculation in your
13 report, right?

14 A No, I determined it's not relevant or
15 informative. It's just to have a general background
16 sense as to what the realistic depictions of tattoos
17 mean sort of in the context of accused video games.

18 Q Do you know how many tattooists have inked
19 tattoos on players in NBA 2K?

20 MR. McMULLEN: Objection, vague, calls for
21 speculation.

22 A I do not know.

23 Q Did you try to find out?

24 A I don't believe I have.

25 Q To estimate revenue associated with

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1 MR. McMULLEN: Objection, calls for
2 speculation.

3 A I do not know how many different forms it
4 appears.

5 Q The NBA logo appears on the box that
6 contains the NBA 2K disk?

7 MR. McMULLEN: Objection, no foundation.

8 A I don't know about disk, but generally on
9 the covers of the game that I've seen the digital
10 reproductions, it does.

11 Q Well, you've actually purchased NBA 2K,
12 right?

13 A Correct.

14 Q The box had the NBA logo on it, right?

15 A I don't recall specifically, but I've seen
16 the covers of 2K16 since and those -- I'm almost
17 certain they've included an NBA logos.

18 Q NBA logos are on the start-up screens of the
19 game, right?

20 MR. McMULLEN: Objection, calls for
21 speculation.

22 A That's correct.

23 Q The NBA logo is a trademark, right?

24 MR. McMULLEN: Objection, calls for a legal
25 conclusion.

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1 A I believe so.

2 Q There's goodwill associated with the NBA
3 trademark?

4 MR. McMULLEN: Same objection, calls for a
5 legal conclusion.

6 A There could be. I haven't seen financials
7 of the NBA association.

8 Q The use of the logo tells people the game is
9 authorized by the NBA, right?

10 MR. McMULLEN: Objection, calls for a legal
11 conclusion.

12 A That's generally interpretation of what a
13 trademark would suggest if it's valid, but I haven't
14 analyzed that question as an expert.

15 Q The NBA logo would serve as a trademark like
16 the name Kellogg's on a cereal box, right?

17 MR. McMULLEN: Objection, calls for legal
18 conclusions.

19 A I'm not sure if that's the example that I
20 would use, but I think I understand the general
21 idea.

22 Q Do you agree with it?

23 MR. McMULLEN: Objection, calls for a legal
24 conclusion, vague.

25 A As an economist, I would probably start with

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1 the point of comparing the NBA logo to other logos
2 of professional leagues rather than something like a
3 Kellogg's cereal.

4 Q And the NBA logo is a signal to consumers
5 about the quality of the product on which it is
6 affixed, right?

7 MR. McMULLEN: Objection. It's beyond the
8 scope of the expert's opinion to opine on trademark
9 law.

10 A It could be.

11 Q You also compared Dr. Bogost's calculation
12 to contributing large portions of revenue from the
13 sale of a laptop keyboard because the keyboard is
14 large on the computer, right?

15 MR. McMULLEN: Can I hear that back, please?

16 (Record read as requested.)

17 MR. McMULLEN: Object to the form of the
18 question. You can answer if you're able.

19 A Right. That's one of the hypothetical
20 examples of what -- the methodology that Dr. Bogost
21 used, what it would mean in applying of settings
22 like a laptop or like NBA logo. I believe I give
23 another example -- you know, NBA was meant to give
24 an example as pro rata of the source code. The
25 keyboard, you're considering the size. The logo on